IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 1580 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE S.K.KESHOTE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? Yes

2. To be referred to the Reporter or not? Yes

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3. Whether Their Lordships wish to see the fair copy of the judgement? No.

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No

5. Whether it is to be circulated to the Civil Judge? No

KANAKRAI BACHUBHAI BHOJAK

Versus

VANKANER MUNICIPALITY

Appearance:

MR KS ACHARYA for Petitioner

MR RJ OZA for Respondent

CORAM : MR.JUSTICE S.K.KESHOTE

Date of decision: 14/10/97.

CAV JUDGEMENT

This writ petition has been filed by an ex-employee of the respondent-Municipality under Article 227 of the Constitution of India, challenging the Award of the Labour Court, Rajkot, dated 29.12.1990 in Reference (LCR) No. 8791 of 1986.

The facts of the case are to be taken briefly for the purpose of appreciating controversy which has been raised by the parties in this Special Civil Application. The petitioner was appointed as Octroi Clerk on daily-wage basis by the respondent on 10.7.1981 and his services were dispensed with on 23.10.1985. The petitioner raised an industrial dispute. The dispute has been referred by the Government under its order dated 11.4.1986 for adjudication, to the Labour Court, Rajkot. The Labour Court, Rajkot, found that termination of services of the petitioner was effected in violation of the provisions of Section 25F of the Industrial Disputes Act, 1947, but reinstatement has been declined & an amount of Rs.5,000/ was awarded to be paid by the respondent to the petitioner by way of notice pay, retrenchment compensation and the amount in lieu of reinstatement. Hence, this Special Civil Application before this Court.

The learned counsel for the petitioner contended that when the termination of services of the petitioner was found to be in violation of the provisions of Section 25F of the Industrial Disputes Act by the Labour Court then it should have passed an order for his reinstatement. It has next been contended by the learned counsel for the petitioner that the respondent has violated the provisions of Sections 25G and 25H of the Industrial Disputes Act also in the present case. The respondent has taken many other person in employment after termination of the services of the petitioner and reference in this respect has been made in para (i) of para-1 of the Special Civil Application. By making reference to the Civil Application No. 8291 of 1996, the learned counsel for the petitioner contended that many persons named therein have been given appointment after filing of this Special Civil Application. Lastly, the learned counsel for the petitioner relying on the decision of this Court given in Special Civil Application No.6516 of 1990 on 20.11.1992, contended that the writ petition deserves to be allowed as in the identical matter reinstatement has been ordered. The learned counsel for the petitioner has also placed reliance on the decision of the Bombay High Court in the case of Chandraman H. Upadhyaya v. Rajasthan Cooperative Housing Society Limited, Bombay (1988(5) BLR page 786).

On the other hand, Mr. R.J. Oza, learned counsel for the respondent has contended that the Labour Court has given cogent and convincing reasons for not granting reinstatement to the petitioner. The learned counsel for the respondent has contended that even if the order of termination of the petitioner is found to have

been made in violation of Section 25F of the I.D. Act, still in the given case while exercising the powers under Section 11(A) of the said Act, the Labour Court could have declined to order for reinstatement of the workman concerned. He has further contended that reinstatement is not the rule where termination has been found to be illegal by the Labour Court and that the Labour Court has all powers to pass appropriate order in favour of the workman. Lastly, the learned counsel for the respondent has contended that financial position of the respondent-Municipality was not good and that the Collector of Rajkot has specifically directed for not engaging any person as Rojamdar and considering these aspects of the matter the Labour Court has rightly declined to grant reinstatement to the petitioner.

I have given my thoughtful consideration to the submissions made by the counsels for the parties. First of all I consider it to be appropriate to make a reference to two Civil Applications filed by the petitioner in this Special Civil Application. The first application being Civil Application No. 6997 of 1996 has been filed by the petitioner before this Court on 9.9.1996 with a prayer that a direction be given to the respondent to give employment to the petitioner. This employment has been claimed on the ground that after filing of this Special Civil Application many other persons have been appointed as Octroi Clerks by the respondent. This Civil Application has been disposed of by this Court on 29.8.1996. On the basis of the same facts and the same grounds the second application being Civil Application No. 8291 of 1996 has been filed by the petitioner before this Court. This Civil Application has been decided by this Court on 12.9.1997 and this Court has considered it to be proper to hear the Special Civil Application at an early date and accordingly it has been fixed. Rest of the prayers made in this Civil Application were not pressed by the learned counsel for the applicant.

In these two Civil Applications it has been mentioned that the respondent had recruited new employees as Octroi Clerks. These persons named in para-5 of the Civil Application No. 6997/96 have been recruited during the period between 1992 and 1996. The petitioner has not come out with the case that these persons were appointed as daily-wagers or without following any procedure or rule. It may be possible that after the decision in the reference of the petitioner, some posts of octroi clerks would have been sanctioned and by following proper procedure or rule appointments would have been made.

These are the points to be taken specifically by amending the Special Civil Application. Otherwise also this Court cannot go into this question in the present proceedings as the decision that may be given on this point may adversely affect the persons named therein, though they are not parties to this petition. In the Special Civil Application also the petitioner made a reference to the cases of some of the employees and stated that though they have been appointed as daily wagers their services have been regularised. It is suffice to say that these are the points which were not raised before the Labour Court and normally in the proceedings under Article 227 of the Constitution the petitioner cannot be permitted to raise new points and more so, when it is mixed question of law and fact. Where a mixed question of law and fact is sought to be raised for the first time, the Court should not permit the same. Even if it is to be taken that appointments have been made or services of persons mentioned in the Civil Application were regularised, still the larger issue that arises for consideration is, whether on this plea the petitioner can be given any relief. This plea is of discrimination and it is no more res integra that an illegal action of the authority cannot be made ground for discrimination by the petitioner in the Special Civil Application under Articles 226 or 227 of the Constitution of India. If such a plea is allowed to be raised then this Court will be asking the respondent to perpetuate an illegality, meaning thereby to commit more illegality. That is not the scope and ambit of the provisions of the Constitution of India. The validity of the order impugned in this Special Civil Application has to be considered with reference to the case of the petitioner and while doing so, this Court will not permit the petitioner to raise the plea of discrimination on the ground that some other illegal orders have been passed by the respondent-authority.

The decision of the Bombay High Court on which reliance has been placed by the learned counsel for the petitioner is of no help to him in this Special Civil Application. A distinction has to be drawn in the cases where the non-compliance of the provisions of Section 25 of the Industrial Disputes Act, is sought to be defended on the ground that employers are facing financial crisis. This aspect has to be considered while passing final award by the Labour Court in a case where termination of the employee is held to be made in violation of or non-compliance of the provisions of Section 25F of the I.D. Act. In the first case it is understandable that financial crisis may not be a good ground for justifying

the non compliance of the provisions of Sec.25F of the I.D. Act while terminating the services of the employee. In the second case, I am of the considered opinion that it is a very relevant and material point. The Labour Court while dealing with the cases of termination of services of workmen, would be perfectly justified to decline to order reinstatement of the workmen even though it found that the termination of services is totally illegal, on the ground of financial crisis of the employer. Neither the Labour Court nor this Court can put more financial burden on the employer and more so, when employer is a Municipal Corporation or Municipality, which has to undertake manifold work ofthe public welfare. In this case before the Labour Court sufficient material has been produced by the respondent on this point that reinstatement of the petitioner may not be ordered otherwise it would be a heavy financial burden on the Municipality. From the statement of the Chief Officer of the respondent (Exh.38) it comes out that the financial condition of the Municipality was not satisfactory. Moreover, the Collector, Rajkot has also directed the respondent to dispense with the services of Rojamdars. In pursuance of the directions of the Collector contained in the notice dated 24.10.1985 (Exh.27) services of many Rojamdars were terminated on the grounds that their services are not required by the Municipality and that the financial condition of the Municipality was very bad. In return nothing has been produced on record before the Labour Court by the petitioner on this point.

More over, the question as to whether the financial condition of the respondent is good or not, is basically a question of fact. From the statement of the Chief Officer of the respondent as well as the documents (Exh.27) it appears that the Labour Court has not committed any error much less any error apparent on the face of the record in holding that the financial condition of the respondent is not sound. This Court sitting under Article 227 of the Constitution of India can interfere with the order or award where it finds that it is perverse or the Labour Court has misread the evidence produced on record or it has misdirected itself to draw an inference from the material evidence produced on record. The learned counsel for the petitioner has not raised any ground that the Labour Court has misread or misdirected itself in appreciating the evidence produced before it by both the parties. The Labour Court was perfectly justified in holding that while dealing with the question of reinstatement of a workman it cannot force the opponent to reinstate Rojamdars in service when

the opponent is not financially sound and more so, when there is clear instructions from the Collector of the District not to appoint any Rojamdar. Such an order can be passed by the Labour Court under Section 11A of the I.D. Act, 1947. In such cases only option left to the Labour Court is to award some compensation in lieu of reinstatement which what exactly has been done in this case. I do not find any illegality in the award of the Labour Court which calls for interference of this Court sitting under Article 227 of the Constitution of India. The other contentions raised on behalf of the petitioner are also equally of no substance. These contentions have been already dealt with by me earlier and now it is to be mentioned that daily-wagers have no right to continue on the post. The appointment of the petitioner on the post of octroi clerk was de hors the Rules. Appointment to the post of octroi clerk has to be made by regular selection. It is not the case of the petitioner that his appointment was made after following the procedure laid down for recruitment or after inviting applications from the open market. The petitioner might have been continued on the post as a daily-wager, but it will not give him any right to continue on the post. The respondent was within its competence and powers to terminate the services of daily wager where his services are not required. If the prayer sought for by the petitioner is granted, then this Court will be asking the respondent to carry the financial burden which it is unable to carry.

Much reliance has been placed by the learned counsel for the petitioner on the decision of the Division Bench of this Court in the case of this very Nagarpalika. But the said decision is of no help to him in this case. In the said case the Labour Court has passed an award for reinstatement with backwages in favour of the respondent-workman and this Court has not found it to be a fit case to interfere with the order under Arrticle 227 of the Constitution of India. It was not a case where reinstatement has been denied on account of bad financial condition or on account of some order passed by the Collector to discontinue the Rojamdars. Each case has to be decided on its facts. I do not find any reason to interfere with the award passed by the Labour Court in the present case.

Lastly, the learned counsel for the petitioner has made a reference to the fact that persons whose services have been terminated vide notice (Exh.27) referred to above, have approached this Court and this Court has protected them. The petitioner has not

produced anything on record in support of this contention. Still, even assuming so, he cannot be given any relief on the basis of the same. In the said case only interim relief has been granted and matter has not been decided by this Court on merits.

Otherwise also, admittedly, the petitioner was appointed on daily wage-basis and his services came to be terminated on 23.10.1985 i.e. about 12 years back. I do not think it proper in the larger interest now to pass an order for reinstatement of a daily wager after this much years of his discontinuation from service. Though there is nothing on record, still it is difficult to accept that during all these years the petitioner would not have got himself employed elsewhere. Taking into consideration all these facts I do not find any ground in this case to interfere with the award passed by the Labour Court.

In result, this Special Civil Application fails and the same is dismissed with no order as to costs.

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